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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/835,507	04/16/2001	Scott D. Ritche	P5680	5397
32658	7590	06/15/2004		
HOGAN & HARTSON LLP ONE TABOR CENTER, SUITE 1500 1200 SEVENTEEN ST. DENVER, CO 80202			EXAMINER FLEMING, FRITZ M	
			ART UNIT	PAPER NUMBER
			2182	

DATE MAILED: 06/15/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/835,507

Applicant(s)

RITCHE, SCOTT D.

Examiner

Fritz M Fleming

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☐ This action is FINAL. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-27 is/are pending in the application.
- 4a) Of the above claim(s) ____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 1-27 is/are rejected.
- 7) ☐ Claim(s) ____ is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 16 April 2001 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. ____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.


FRITZ FLEMING
PRIMARY EXAMINER
GROUP 2100

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date 04/16/01.
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. ____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: ____.

Double Patenting

1. Claims 18,19,22-27 of this application conflict with claims 1-9 of Application No. 09/779,147 (i.e. US 2003/0110248 A1). 37 CFR 1.78(b) provides that when two or more applications filed by the same applicant contain conflicting claims, elimination of such claims from all but one application may be required in the absence of good and sufficient reason for their retention during pendency in more than one application.

Applicant is required to either cancel the conflicting claims from all but one application or maintain a clear line of demarcation between the applications. See MPEP § 822.

2. A rejection based on double patenting of the "same invention" type finds its support in the language of 35 U.S.C. 101 which states that "whoever invents or discovers any new and useful process ... may obtain a patent therefor ..." (Emphasis added). Thus, the term "same invention," in this context, means an invention drawn to identical subject matter. See *Miller v. Eagle Mfg. Co.*, 151 U.S. 186 (1894); *In re Ockert*, 245 F.2d 467, 114 USPQ 330 (CCPA 1957); and *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970).

A statutory type (35 U.S.C. 101) double patenting rejection can be overcome by canceling or amending the conflicting claims so they are no longer coextensive in scope. The filing of a terminal disclaimer cannot overcome a double patenting rejection based upon 35 U.S.C. 101.

3. Claims 18,19,22-27 are provisionally rejected under 35 U.S.C. 101 as claiming the same invention as that of claims 1-9 of copending Application No. 09/779,147 (i.e. US 2003/0110248 A1). This is a provisional double patenting rejection since the conflicting claims have not in fact been patented.

Claim Rejections - 35 USC § 103

4. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and

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the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

5. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148

USPQ 459 (1966), that are applied for establishing a background for determining

obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

6. Claims 1-27 are rejected under 35 U.S.C. 103(a) as being unpatentable over applicant's admitted prior art discussion of pages 3-5.

The admitted prior art discussion relied upon is repeated below:

[0004] Distributed computer networks with de-centralized software environments are increasingly popular designs for network computing. In such distributed computer networks, a copy of a software program (i.e., an application package such as Netscape.TM., Staroffice.TM., and the like) is distributed over a data communications network by a master or central network device for installation on client network devices that request or require the particular application package. The master network device may be a server or a computer device or system that maintains current versions and copies of applications run within the distributed computer network.

[0005] When an application is updated with a new version or with patches to correct identified bugs, the master server functions to distribute updated application packages through one or more intermediate distribution servers and over the communications network to the appropriate client network devices,

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i.e., the devices utilizing the updated application. The client network device may be an end user device, such as a personal computer, computer workstation, or any electronic computing device, or be an end user server that shares the application with a smaller, more manageable number of the end user devices within the distributed computer network. In this manner, the distributed computer network provides stand-alone functionality at the end user device and makes it more likely that a single failure within the network will not cripple or shut down the entire network (as is often the case in a centralized environment when the central server fails).

[0006] While these distributed computer networks provide many operating advantages, servicing and correcting distribution to these client network devices during software installation and operation are often complicated and costly tasks. Correcting a failed distribution typically requires the redistribution of the package to each of the devices that did not receive the package, e.g., all devices downstream in the network from an affected or faulting device or server. To be effective, the redistribution preferably issues the redistribution command to assure use of the same installation parameters (i.e., the distribution command strings), the same distribution list, and the same packages.

[0007] However, servicing the network prior to redistribution and replicating the distribution process has been problematic and costly due to several factors. The networks often include large numbers of client network devices, such as intermediate distribution servers, end user servers, and end user devices upon which applications must be installed and which must be accessed and serviced when distribution problems occur. Additionally, the client

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network devices may be located nearly anywhere as the use of the Internet as the distribution path enables application packages to be rapidly and easily distributed worldwide. The master server is typically located in a geographic location that is remote from the intermediate distribution servers and client network devices, which further complicates servicing of the devices as repair and redistribution personnel need to be deployed at or near the location of the failing device such as from a regional or onsite service center. Efforts have been made to facilitate effective application package distribution and installation in numerous and remotely-located client network devices (see, for example, U.S. Pat. No. 6,031,533 to Peddada et al.). However, existing software distribution systems do not meet the industry need for effective package redistribution and servicing of network devices prior to redistribution.

[0008] Generally, during operation of a distributed computer network, a master server executing a distribution tool operates to distribute an application package over the communications network through intermediate distribution servers to a number of remote end user servers and end user devices. The receiving devices may be listed as entries in a network distribution database which includes a delivery address (e.g., domain and/or other information suiting the particular communications network), a client node network name, package usage data (e.g., which packages are used or served from that client network device), and other useful package distribution information. A distribution list is created for a particular application, and the distribution tool uses the list as it transmits copies of the application package to the intermediate distribution servers for final distribution to the appropriate end user servers and end user devices for installation.

[0009] If delivery fails, the affected or upstream client network devices or intermediate servers transmit error messages back to the distribution tool. In a relatively large network, the distribution tool may receive hundreds, thousands, or more error messages upon the distribution of a single application package. In many distributed computer networks, a service desk device or service center (e.g., a computer system or a server operated by one or more operators that form a service team) is provided to respond to software installation problems by issuing service requests and performing the steps necessary to redistribute the software packages. In these networks, the distribution tool gathers all of the error messages and transmits them to the service desk as error alerts. For example, the distribution tool may send e-mail messages corresponding to each error message to the e-mail address of the service desk to act on the faults, errors, and failures in the network.

[0010] The operator(s) of the service desk must then manually process each e-mail to determine if service of the network or client network devices is required, which service group is responsible for the affected' device, and what information is required by the service department to locate the device and address the problem. If deemed appropriate by the operator, the service desk operator manually creates (by filling in appropriate fields and the like) and transmits an electronic service request, i.e., service job ticket, to a selected service group to initiate service. The receiving service group then processes the job ticket to assign appropriate personnel to fix the software or hardware problem in the network device.

[0011] To redistribute the failed packages, the operator then typically has to

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first determine all distributions that failed during the time the affected devices, such as an intermediate distribution server, were down or inoperable for software package distribution. To perform this determination, the operator may have to access the distribution logfiles of the master device and/or interface with the distribution tool with the identified time period. The operator then manually restages each of the failed distributions by going to the physical location of the intermediate distribution server and accessing data in a distribution logfile stored on the server. The distribution data includes the names or identifications for the packages included in the failed distributions for dates in the identified time period and, significantly, the distribution command strings which provide the original parameters (such as a command to replace the existing software with the distributed software) used in the failed distribution. Access to the intermediate distribution server is often obtained through a user interface (such as a graphical user interface).

As seen above, the method set forth as admitted prior art by applicant is a manual method that relies upon the affected client network device transmits error messages back to the distribution tool, wherein the error messages reflect a failed distribution attempt, with a master device/server, intermediate devices and software packages [0004-8]. Thus the error messages help the operator of the manual method identify the failed intermediate device. Likewise, the distribution job that failed is identified at [0009], so that the operator can go to the master logfile and failed server distribution logfile [0011] to then manually recreate the failed distribution from the original commands via the manual restaging, which is the claimed redistribution. The user interface is in [0011], with an implicit approval built in to the restaging, as a restaging

requires the implicit approval of the operator performing such. The restaging is based upon a manual parsing of the error messages, as well as a manual review of the logfiles. Obviously, a successful restaging requires the updating of failed indications, as it would make no sense to an operator of ordinary skill in the art to successfully stage a restaging and leave indications of the failed distribution in place, as the whole point of the restaging is to correct the failed distribution and any indications thereof. The restaging includes review of the logfiles so that the redistribution list is accurate for the desired recipient network devices. It is to be noted that claim 10 does not include any automatic operations, thus the actions of the prior art manual restaging render the claimed redistribution tool as obvious, as the claimed recitations are merely a cataloging of the admitted prior art manual activities. As set forth above, the graphical user's interface is a part of the redistribution tool, and is used to access the intermediate device.

As far as the mere automating of the above admitted prior art manual activity, the examiner relies upon the following portion of the MPEP, section 2100:

III. AUTOMATING A MANUAL ACTIVITY

In re Venner, 262 F.2d 91, 95, 120 USPQ 193, 194 (CCPA 1958) (Appellant argued that claims to a permanent mold casting apparatus for molding trunk pistons were allowable over the prior art because the claimed invention combined "old permanent-mold structures together with a timer and solenoid which automatically actuates the known pressure valve system to release the inner core after a predetermined time has elapsed." The court held that broadly providing an automatic or mechanical means to replace a manual activity which accomplished the same result is not sufficient to distinguish over the prior art.).

Thus, as far as claim 4 is concerned, the admitted prior art manual activity requires accessing the failed device to perform the redistribution via the graphical user's interface. Therefore to broadly (as the claim merely broadly recites an automation at the affected device) automate a redistribution tool at the affected device reflects the above Venner, in that the manual activity has been replaced by an automatic means in the form of the redistribution tool at the affected device. In fact, the claim does not preclude a partial automation of the redistribution to include an automation of the redistribution commands under operator control. Thus per claim 5, the operator can call such an automated tool at the affected device, as in the prior art manual method manual restaging [0011]. Accessing the graphical user's interface involves at least a portion of the network to the extent claimed. Thus the claim 6 step is rendered obvious, again by the automation at the affected device, wherein the automation requires, at least to the extent claimed, a distribution manager, as the prior art manual method requires a distribution manager function to perform the redistribution. The same rationale applies to an automation of the manual searching of the logfiles. The same rationale also applies to an automation of the building of a job ticket, as the manual prior art method requires the manual creation of such [0010], as the claimed method of 15 has not automated the problem correction, as such has been accomplished as in the prior art manual method. As discussed above, the manual method requires at least an implicit approval of the operator, and to automate such to display and query the redistribution commands, falls under obvious subject matter using the Venner rationale of the broadly claimed automation of a well known prior art manual activity. Thus the claims only

require an automation of the redistribution commands, as manual input is still claimed regarding the approval and issuance of the redistribution (claim 17). Turning to claims 18-27, again the manual prior art method is relied upon for an obviousness type rejection. For example, the manual method does have the automatic generation of e-mail error messages sent to the service desk operator(s) for use in the manual creation of the job tickets. Obviously, the service desk operator(s) uses the alerts to identify a failure type, to manually create a job ticket. As the whole purpose of manual job ticket creation is to track errors by incremented job ticket numbers, it is obvious that the various alerts are tracked by value, and when this value exceeds some predetermined threshold (which can be a single alert, as a threshold of "1" is met by the prior art and not excluded by the claim language), then the job ticket is created to initiate corrective measures. In fact, claim 18 requires no automation whatsoever. As far as stored in memory is concerned, the claims do not require that the memory be computer based, and as such, the memory of the service desk operators meets what is claimed. As far as the varied thresholds are concerned, such is obvious based upon information gained by the service desk in historic operations, as operations at a service desk involve the use of historical data when it comes to determining what constitutes errors that need correction via job tickets. Obviously, a known down intermediate device [0011] is indicative of being on an outage list, and an outage list is the type of information used at the service desk when determining if an error based job ticket is needed. Obviously, job tickets will not be issued for devices already known to be down. Obviously, error tracking via the job tickets results in files being created based upon the [0009] "of the

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service desk to act on the faults, errors, and failures in the network." And the [0010] "what information is required by the service department to locate the device and address the problem." Network operations involves the use of stored locations representing the various network devices, and to update stored locations based upon received alerts is obvious subject matter falling under the [0009] "of the service desk to act on the faults, errors, and failures in the network." The manual method involves the correct selection of the appropriate maintenance center, i.e. the selected service group of [0010]. Finally, the job ticket is an electronic service request transmitted to a service group, which obviously entails an e-mail in the broadest reasonable sense. As is known in the use of e-mails, various status tracking options can be selected to ensure delivery to the selected service group. Obviously, a failed e-mail delivery will be retransmitted, as failure to do so is not in keeping with proper service desk "to act on the faults, errors, and failures in the network." [0009].

Conclusion


7. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. The cited art sets forth the copending published application, the published instant application, and state of the art disclosures regarding software distribution, redistribution, and error message/alert handling and job ticket creation.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Fritz M Fleming whose telephone number is 703-308-1483. The examiner can normally be reached on 9-5.

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Jeffrey Gaffin can be reached on 703-308-1483. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).


Fritz M. Fleming
Primary Examiner
Art Unit 2182

fmf